No. 76-502

In the Supreme Court of the United States

OCTOBER TERM, 1976

MICHAEL J. BENNETT, PETITIONER

v.

DONALD H. RUMSFELD, SECRETARY OF DEFENSE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR RESPONDENT IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioner contends that the United States cannot constitutionally provide military assistance to Israel. Characterizing Israel as a "theocracy", he claims that the provision of financial assistance by the United States under the Emergency Security Assistance Act of 1973, Pub. L. 93-199, 87 Stat. 836, violated the "Establishment Clause" of the First Amendment (Pet. 3).

Petitioner instituted this action in the United States District Court for the District of Columbia, which dismissed the case on the grounds that "plaintiff lacks standing, the question presented is a political one not justiciable by this Court and the case is moot" (Pet. App. 5a). The United States Court of Appeals for the District of Columbia Circuit affirmed without opinion on the authority of *Dickson* v. *Ford*, 521 F. 2d 234 (C.A. 5), certiorari denied, 424 U.S. 954 (Pet. App. 1a). In *Dickson*, the Fifth

Circuit upheld the dismissal of a similar taxpayer's challenge to the Emergency Security Assistance Act on the ground that the case presented a non-justiciable "political question."

1. Petitioner requests that the Emergency Security Assistance Act of 1973 be declared invalid and that its enforcement be enjoined. See Pet. App. 6a-8a. But that Act only authorized expenditures for the fiscal year 1974, and we have been informed (App., *infra*) that all of the appropriated funds have now been expended.[1] A suit to declare invalid and enjoin enforcement of a statute that is no longer in effect does not present a live case or controversy subject to adjudication under Article III of the Constitution. See *Morris* v. *Weinberger*, 410 U.S. 422; *Bryan* v. *Austin*, 354 U.S. 933.

2. In any event, petitioner's suit is non-justiciable. The Emergency Security Assistance Act was designed to maintain the balance of military forces in the Middle East by authorizing military assistance and foreign military sales credits for the state of Israel. See S. Rep. No. 93-657, 93d Cong., 1st Sess. (1973); H.R. Rep. No. 93-702, 93d Cong., 1st Sess. (1973). By seeking an injunction against implementation of the Act, petitioner attempted to utilize the judicial forum to challenge the government's foreign policy and, indeed, to halt its implementation. This Court consistently has resisted such attempts to inject the judiciary into the conduct of foreign relations. See *Oetjen* v. *Central Leather Co.*, 246 U.S. 297, 302. As this Court observed in *C. & S. Air Lines* v. *Waterman Corp.*, 333 U.S. 103, 111:

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[1]Petitioner has not attempted to amend his complaint to include a challenge to any currently existing aid program. Cf. *Dickson* v. *Ford*, *supra*, 521 F. 2d at 235.

> [T]he very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. They are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.

The court of appeals correctly affirmed the district court's finding that the Emergency Security Assistance Act "is closely bound up with several delicate areas of American foreign policy" and this case therefore "presents a non-judiciable [sic] political question which cannot be resolved by the Courts" (Pet. App. 4a).[2]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

December 1976.

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[2]Petitioner also argues (Pet. 5) that the district court erred in not convening a three-judge court. A three-judge court was not necessary in this case. A single judge may dismiss a potential three-judge court action on jurisdictional or justiciability grounds. See *McLucas* v. *DeChamplain*, 421 U.S. 21, 28; *Gonzalez* v. *Automatic Employees Credit Union*, 419 U.S. 90, 100.

DOJ-1976-12

APPENDIX

DEFENSE SECURITY ASSISTANCE AGENCY
WASHINGTON, D.C. 20301

09 DEC 1976

In reply refer to:
I-13177/76

Mr. Robert H. Bork
Solicitor General
U.S. Department of Justice
Washington, D.C. 20530

Dear Mr. Bork:

Re: Michael J. Bennett vs. Donald H. Rumsfeld, Secretary of Defense, Case No. 76-502.

I am Comptroller of the Defense Security Assistance Agency which is charged with the implementation of the Emergency Security Assistance Act of 1973, Pub. L. 93-199, 87 Stat. 836. As Comptroller, I am charged with the responsibility of administering the accounts containing funds appropriated under the authorization of that Act. I certify that all funds made available under the authority of the Emergency Security Assistance Act of 1973 have now been expended.

Sincerely,

[Signed]
Robert B. Hammond
Comptroller